

ISSUE DATE: January 15, 1999

In the Matter of

HOWARD F. MCNEILL

Claimant

v.

SEALAND TERMINAL, INC.,

Employer

and

**MIDLAND INSURANCE COMPANY, in
liquidation, by and through MISSISSIPPI
INSURANCE GUARANTY
ASSOCIATION**

Carrier

CASE NO.: 1998-LHC-0693

OWCP NO.: 06-33801

Appearances:

Mager A. Varnado, Jr., Esquire
For Claimant

Paul B. Howell, Esquire
For Employer

Before: PAUL H. TEITLER
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS ON MODIFICATION

This proceeding involves a claim for disability compensation filed by Howard F. McNeill, Claimant, pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (the Act).

A formal hearing was held in Gulfport, Mississippi, on July 22, 1998, at which time all parties were afforded full opportunity to present evidence and arguments as provided in the Act and applicable regulations.

The findings and conclusions which follow are based upon a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations and pertinent precedent.

STIPULATIONS

At the hearing, the following stipulations were entered into the record:

1. The Act (33 U.S.C. §§901-950) applies to this claim.
2. Claimant and Employer were in an employer-employee relationship at the time of the accident/injury.
3. The accident/injury arose out of, and in the scope of, employment.
4. The date of the accident/injury was May 16, 1977.
5. Claimant timely notified Employer of his injury.
6. It is agreed that Claimant filed a timely notice of claim.
10. Claimant was paid total temporary disability from May 16, 1977 to August 28, 1978 at \$357.00 per week. Claimant was paid permanent total disability from August 29, 1978 to the present time.
11. Claimant's average weekly wage was \$231.08.

ISSUES

Per the joint stipulation of the parties (JX 1), the following issues were presented for resolution:

1. Whether a change in conditions has occurred;
2. Whether Claimant is entitled to reimbursement for unpaid medical costs;
3. Attorneys' fee.

STATEMENT OF THE CASE

The Claimant, Howard McNeill, was employed by Sealand Terminal, Inc. as a longshoreman until May 16, 1977. (EX 1 at 2). On that date, Claimant suffered injuries to his back while attempting to pull a box of pineapples into a position to be discharged.¹ (EX 1 at 2). As a result of these injuries, Claimant filed a claim for compensation under the Longshore and Harbor Workers' Compensation Act, and on September 20, 1985, Administrative Law Judge James W. Kerr, Jr., found that Claimant was permanently totally disabled as a result of his injuries. (EX 1 at 8).

In the current modification proceeding, Employer contends that Claimant has undergone a change in physical, mental and economic conditions which have rendered him only partially disabled. Accordingly, Employer argues that the amount of Mr. McNeill's disability payments should be reduced. Claimant argues that Mr. McNeill continues to be permanently totally disabled as a result of his injuries.

PROCEDURAL HISTORY

Claimant was found to be temporarily totally disabled by Administrative Law Judge Ben H. Walley. (EX 2 at 2). Subsequently, by Decision and Order dated October 11, 1985, Administrative Law Judge James W. Kerr, Jr. found Claimant had achieved maximum medical improvement on August 28, 1978, and accordingly held that Claimant was permanently totally disabled as of that date. (EX 1 at 8). Additionally, Judge Kerr found that Claimant was totally disabled due to his psychological impairment. (EX 1 at 7). The Benefits Review Board affirmed Judge Kerr's findings on May 31, 1989. (EX 2). Thereafter, on July 20, 1998, Employer filed the current modification proceeding based upon a change in condition.

The Decision and Order contained herein are rendered after thorough consideration of all record evidence and hearing testimony, as well as the proposed decisions of both parties. The following is a summary of the evidence submitted by both parties.

Testimony of Howard McNeill

The Claimant, Howard McNeill, was born on April 1, 1934, and graduated from Gulfport High School. (TX 20). In 1966, he was employed by Sealand Terminal, Inc., a longshore shipping company. (TX 20). On May 16, 1977, he was injured at work, and worked periodically after that accident until the end of June, when he entered the hospital for surgery. (TX 22-23).

¹ Prior to the May 1977 injury Claimant sustained two other employment-related injuries. In April 1976, Claimant was squeezed with two bales, suffering pain in his lower left rib cage. Following this incident, Claimant was able to return to his employment, missing only a few days of work. Similarly, on March 30, 1977, Claimant was injured when a boom fell, striking him in the left rib cage and back. The Claimant returned to work following this injury on April 5, 1977.

Mr. McNeill testified that since his last hearing in December of 1984, he has had very little medical treatment. (TX 24). According to his testimony, he last saw Dr. Longnecker around 1986, he last saw Dr. Buckley between 1982 and 1984, and he last saw Dr. Cranton before the trial in 1984 or 1985. (TX 42-44). He explained that he had not sought additional treatment because although he requested a letter of authorization for medical treatment numerous times, he did not receive the letter. (TX 24). He also submitted several hundreds of dollars' worth of medical prescription receipts to Mississippi Insurance Guaranty, but the prescriptions have not been paid, with the exception of the first packet of receipts. (TX 25).

Mr. McNeill's current symptoms are continuous pain, weakness, and spasms in his back. (TX 31). As a result of his pain, he sometimes has trouble sleeping. (TX 33). He also stated that at times, he is completely paralyzed. (TX 33-34). This may last as long as two weeks. (TX 34). He can sit periodically, but is more comfortable when he is moving. (TX 35). However, he can tolerate sitting for up to 30 minutes. (TX 35). Mr. McNeill testified that he is able to walk, and walks every day that his health permits, based on his doctors' advice. (TX 36). He stated that each morning when he gets up he is "pulled to the right." (TX 36). He does 35 to 45 minutes of yoga or exercise before he is able to walk. (TX 36).

Mr. McNeill testified that he is able to manage his daily chores, such as cutting the grass with a self-propelled lawn mower and working in his yard. (TX 39) He stated that "the bending that I do, stooping, the bending that I do weeding, to me, is more beneficial than anything else I do." (TX 39). He wears a back brace every day, and wears a heavier brace when he walks or works in the yard. (TX 40).

When questioned about the surveillance videotape, he stated that he had reviewed one of the videotapes. (TX 50). He also stated that he did not contest that it was him in the videotapes. (TX 51). Mr. McNeill testified that he can lift a water can weighing ten pounds, an ice chest weighing eight pounds, a weedeater weighing six pounds, and a leaf blower weighing eleven pounds. (TX 54-56). He also testified that a 1985 injury to his elbow may have been caused when he gathered some small weights in a box for his son to take back to college. (TX 56-58).

Mr. McNeill testified that in 1993, he was committed to the Transitional Living Center at the state mental institution for five days. (TX 60). Afterwards, he received psychological therapy for 16 sessions from Dr. Tate. (TX 60). He testified that an incident with his son provoked the attempt to commit him to the institution. (TX 73). After he was released from the Transitional Living Center, he was separated from his wife for three months. (TX 69). During that time, he developed chest pains, which the claimant testified was a heart attack. (TX 73). Claimant testified that Dr. Sangani recommended that he undergo a catheterization, however, he refused under the advice of Dr. Robinson. (TX 77).

Mr. McNeill testified that he did not apply for any of the jobs mentioned by Mr. Walker because all of the jobs were filled. (TX 78-79). He also stated that he has had two cancers

removed. (TX 83). His other health problems have included sinus infections, an injured elbow, and hypertension. (TX 84).

Mr. McNeill also testified regarding Dr. Bazzone's examination. He stated that Dr. Bazzone reviewed x-rays that he brought with him to the examination, and examined the scar from his surgery. (TX 125-126). He also asked Claimant how he responded to cold, damp weather, and what type of activities he was able to engage in. (TX 126).

Testimony and Report of Joseph Walker

Joseph Walker is a vocational rehabilitational counselor. (TX 91). He first met with the Claimant around 1977 or 1978. (TX 92). At that time, due to Claimant's heart condition, Mr. Walker deferred any additional services. (TX 93). The file was recently reopened in June 1997. (TX 93). Mr. Walker reviewed the transcripts from Claimant's prior hearings, and the medical evidence regarding Claimant's work limitations. (TX 93-94). He also reviewed the surveillance videos dated November 15, 1996 and September 19, 1996. (TX 94). He noted that Claimant was 64 years old, and that he had completed high school (TX 94-96). Claimant's vocational history was that he had worked for Office Supply for a number of years as a delivery person and a sales clerk, as a driveway attendant at a service station, that he had obtained a license as an insurance agent, although he had not worked as an insurance agent, and that he had worked on the docks as a longshoreman. (TX 97).

Based on his review, Mr. Walker opined that Claimant would be capable of performing unskilled to semi-skilled work of a semi-sedentary to light level, noting that range of opportunities makes up 48 to 50 percent of the jobs within the general population. (TX 101-102) He identified several jobs that the Claimant could perform, including casino valet attendant, roving security guard, and casino security guard. (TX 102-103). Mr. Walker concluded that:

In having the opportunity to work with the number of people that I work with on a return-to-work program that have significant limitations but yet still perform a range of light work, I would say yes, that considering those factors, that Mr. McNeill could perform the range of sedentary to semi-sedentary and light, or modified-light activity, within the regional economy, or local economy.

(TX 118).

Mr. Walker also reviewed the vocational rehabilitation report of Claimant's expert, Peggy Thiessen and noted areas in which his opinion differed from her opinion. (TX 105-106). Specifically, Mr. Walker disagreed with Ms. Thiessen's use of the Department of Labor's Dictionary of Occupational Title code numbers, stating that the DOT numbers "an be misrepresentative from the standpoint of not characterizing a person's abilities, within the context of actually identifying the job with a specific employer and the job duties that are associated with it." (TX 107).

Finally, Mr. Walker testified that he had performed an additional job survey within the last week, and had identified additional jobs that Claimant would be capable of performing. (TX 113). These jobs included a position as a cashier at Red Arrow Car Wash, which paid \$5.15 per hour, a position as a security gate guard with Gulf Coast Security Services for \$5.15 per hour and increasing to \$5.25 per hour after 90 days of employment, a position as a night auditor at smaller hotels such as Motel 6 or Super 8, paying between \$5.15 and \$6.00 per hour, and booth cashier at a self service station with Coastal Energy, paying \$5.15 per hour. (TX 114-115).

Report of Peggy Thiessen

Peggy Thiessen is a vocational counselor. (CX 3 at 2). She met with the Claimant, Mr. McNeill on June 16, 1997. (CX 3 at 4). Her report, dated June 19, 1998, reviews Claimant's social, educational, medical, and employment history. (CX 3 at 4-15). Additionally, she summarizes medical and psychological reports regarding the Claimant, the surveillance videotape, and the vocational assessment by Joe H. Walker. (CX 3 at 4-15). Ms. Thiessen noted that Claimant graduated from high school. (CX 3 at 4). She also indicated that Claimant's employment history included working at Sealand Terminal as a longshoreman, and working at the Office Supply Company as a Cashier/Sales Clerk. (CX 3 at 15).

Ms. Thiessen provided a Current Vocational Assessment Report. (CX 3 at 19). The Report provided information on Mr. McNeill's aptitudes, interests, general educational development, specific vocational preparation, strength and physical demands, environmental condition tolerance, temperaments, and ability to function in relation to data, people and things. (CX 3 at 21-26). She used this information to conduct a job search, however, no jobs were found which matched Claimant's profile. (CX 3 at 30).

Ms. Thiessen compared the jobs listed by Mr. Walker in his vocational rehabilitation report with her interpretations of the client's abilities. (CX 3 at 32-37). She noted that all of the jobs listed by Mr. Walker fell into the Light Strength Level range, while the Claimant's abilities were in the Sedentary range. (CX 3 at 32-37). Ms. Thiessen concluded that "[t]he outcome of my comparison to the client's level of skills, abilities and limitations, indicate that there are no jobs available to Mr. McNeill with the conditions and restrictions, and the ones indicated by Mr. Joe Walker, are not viable choices." (CX 3 at 32).

Surveillance Videotape

The Employer submitted two surveillance videotapes of Claimant, taken by Terrell Micelli Investigations. In the video, Claimant is seen driving his vehicle, entering a medical building, walking around a boatyard with a companion, walking rather quickly while dressed in exercise clothes for over one hour, carrying a small dog into a veterinarian's office, blowing leaves, retrieving mail from a mailbox, picking pecans from a pecan orchard with a pecan picker, carrying an ice chest, and mowing his lawn for approximately 55 minutes. (EX 4). At no time does the Claimant appear to have difficulty in carrying out these activities. (EX 4).

Medical Report of Dr. Bazzone

Dr. Bazzone is a neurological surgeon. (EX 5 at 1). He examined Claimant on January 22, 1997. (EX 5 at 2). Claimant reported to Dr. Bazzone that he is afflicted by severe pain in the back and right lower extremity at all times, and that he experiences acute exacerbations of this pain where it feels as though his back "locks up" and he is unable to walk. (EX 5 at 2). Claimant reported to Dr. Bazzone that he is unable to any of his usual routine tasks about house. (EX 5 at 2). Claimant also reported that he is unable to bend or lift without back pain, and that his right lower extremity will "collapse" or "give way" whenever he walks for any period of time. (EX 5 at 2). Dr. Bazzone noted that on the basis of his initial evaluation of Claimant, "[O]ne has a picture of a man who is in continuous pain and unable to walk in a normal fashion. Furthermore, on the basis of his symptomatology and the story which he relates, he has been disabled for approximately 20 years and has been afflicted by severe and continuous pain in the back and right lower extremity." (EX 5 at 3).

One week after Dr. Bazzone's evaluation of Claimant, he reviewed the surveillance videotapes. (EX 5 at 3). Dr. Bazzone noted that "Mr. McNeill's activities which are documented by these video tapes are in direct contrast to his symptomatology and the gait patters which he displayed in my offices during the course of my evaluation of him." (EX 5 at 3). Dr. Bazzone indicated that the video shows a man who can walk normally and undertake "very arduous physical activity without any evidence for impairment or disability." (EX 5 at 3). Dr. Bazzone concluded that:

I am of the opinion that Mr. McNeill has not been honest with me in relating his symptomatology. It is impossible for met to believe what he has told me in my offices after viewing his activities on the surveillance video tapes. In brief, I am of the opinion that Mr. McNeill has falsified information and is a malingerer. It is furthermore my opinion that Mr. McNeill is capable of gainful employment and should be returned to employment commensurate with the activities displayed in the surveillance video tapes. This should be done at the earliest opportunity.

(EX 5 at 4).

Report of Dr. Maggio

Dr. Maggio is a Board Certified Psychiatrist. (EX 6 at 1). He evaluated Mr. McNeill on July 21, 1997. (EX 6 at 2). Dr. Maggio reviewed Claimant's prior medical reports, as well as his prior psychiatric reports. (EX 6 at 2). Dr. Maggio summarized Claimant's history of depression following his 1977 injury. (EX 6 at 2-3). He noted that as recently as 1993, Dr. Cranton reported that Claimant continued to be medically and clinically disabled. (EX 6 at 3). Claimant reported to Dr. Maggio that he does not have any current emotional problems, although he did report a prostate problem and arthritis. (EX 6 at 4). Claimant described himself to Dr. Maggio as being active. (EX

6 at 4). Claimant reported that at first he couldn't sleep, but he now goes to bed at 9:30 to 10:00 pm, sleeps all night, and awakens most mornings feeling rested. (EX 6 at 4).

Upon evaluation, Dr. Maggio noted no evidence of any anxiety, depression or thought disorder. (EX 6 at 5). Dr. Maggio reported that Claimant's intellect was felt to be average or above average, his memory was intact, he used abstract thought processes, and his judgment appeared normal. (EX 6 at 5).

Dr. Maggio stated that Claimant could have a possible Axis II disorder which did not require treatment. (EX 6 at 5). He concluded that "Mr. McNeill is not disabled from a psychiatric point of view, does not require treatment from a psychiatric point of view, and could return to work from a psychiatric point of view." (EX 6 at 5).

Other Evidence

In addition to the evidence summarized above, Claimant submitted the following evidence: List of Treating Physicians (CX 1), and Claimant's Medical Bills (CX 2). Employer submitted the following evidence: Decision and Order Awarding Benefits dated October 11, 1985 (EX 1), Order of Benefits Review Board dated May 31, 1989 (EX 2), Surveillance Reports (EX 3), Correspondence of Adjuster (EX 8), Petition for Modification (EX 9), Memorandum of Informal Conference (EX 10), Employer's Pre-Hearing Statement (EX 11), and Definitions from the Physician's Desk Reference (EX 12). Additionally, a stipulation sheet was submitted as a joint exhibit (JX 1). All of this evidence has been carefully considered in the course of evaluating the Claimant's case.

DISCUSSION, FINDINGS OF FACT AND CONCLUSIONS OF LAW

In arriving at a decision in this matter, the Administrative Law Judge is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. Banks v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459 (1968) *reh'g. den.* 391 U.S. 929 (1968); Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962); Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985).

Modification

Modification based on a change of condition is granted where the Claimant's physical or economic condition has improved or deteriorated following entry of an award of compensation. Wynn v. Clevenger Corp., 21 BRBS 290 (1988). The party requesting modification due to a change in condition has the burden of showing the change in condition. See Vasquez v. Continental Maritime, 23 BRBS 428 (1990). The Board has stated that the physical change must have occurred between the time of the award and the time of the request for modification. Rizzi v. The Four

Boro Contracting Corp., 1 BRBS 130 (1974). In the present case, Employer argues that Claimant has undergone a physical, mental, and economic change in condition.

Upon comparing the evidence submitted in the current case to Judge Kerr's findings in the prior Decision and Order, it is apparent that the Claimant has undergone a change in his physical condition. In the initial Decision and Order Awarding Benefits, Judge Kerr wrote:

Claimant testified that his physical condition too has not yet resolved itself; he is plagued with weakness in his lower back which prevents him from standing for a lengthy period of time. Often, when he walks he falls because his legs are unable to support him. For this reason, Claimant contended that he is now relegated to the use of crutches. Additionally, Claimant asserted that his physical disability does not allow him to perform usual household duties such as mowing the lawn, washing dishes and painting the house.

(EX 1 at 5). The evidence submitted by Employer in support of the current modification proceeding presents a very different picture of the Claimant than the picture presented in Judge Kerr's Decision and Order. For example, the surveillance video clearly shows Claimant walking briskly without the use of crutches for over an hour. (EX 4). Similarly, the surveillance video shows Claimant performing several outdoor household tasks, such as blowing leaves and mowing the lawn. Claimant is also seen carrying an ice chest² at one point, and a small dog at another point. Additionally, at the hearing, Claimant testified that "[t]hese are things I have done since four -- it took me the better part of four-and-a-half years to overcome the initial shock and the first heart attack. I've done household chores, vacuuming, washing dishes." (TX at 40).

Additionally, Dr. Bazzone's report supports a finding of a change in physical conditions. Dr. Bazzone's summary of Claimant's History indicated that the patient is afflicted by severe pain in the back and right lower extremity at all times. (EX 5 at 2). Claimant reported to Dr. Bazzone that he is unable to do any of the usual routine tasks about his house, and is unable to bend or lift without back pain. (EX 5 at 2). Claimant also reported to Dr. Bazzone that his right lower extremity will

² At the hearing, Claimant testified that the ice chest was empty and weighed eight pounds. (TX 54-55). In addition, in a Surveillance Videotape Review submitted as part of CX 3, Claimant wrote:

I do not deny carrying an ice chest. However at this time of day it must be empty. It could contain something, it could be empty. What appears to be heavy to some, could in fact, be very light, but appear heavy by the manner it is carried. I do not deny carrying an ice chest, only the appearance or lack of discomfort carrying it.

(CX 3 at 49). It is not possible to discern from the videotape whether the ice chest was empty or full. Therefore, I am considering the ice chest to be empty in my analysis of the evidence.

"collapse" or "give way" whenever he walks for any period of time. (EX 5 at 2). Upon reviewing the surveillance videotape, however, Dr. Bazzone concluded that:

After reviewing all of the information which has been made available to me, both from the patient, the patient's records and the surveillance video tapes, I am of the opinion Mr. McNeill has not been honest with me in relating his symptomatology. It is impossible for me to believe what he has told me in my offices after viewing his activities on the surveillance video tapes. In brief, I am of the opinion that Mr. McNeill is capable of gainful employment and should be returned to employment commensurate with the activities displayed in the surveillance video tapes.

(EX 5 at 4). The evidence demonstrates that Claimant's current physical capabilities are greater than they were at the time of the prior Decision and Order. Accordingly, based on my review of all the evidence, I find that Employer has established a physical change in conditions.

Additionally, Employer contends that the Claimant has undergone a change in mental conditions. At the time of Judge Kerr's initial Decision and Order, Claimant was bothered by suicidal thoughts and an inability to communicate, to concentrate, and to cope with his condition. (EX 1 at 5). Judge Kerr found that Claimant's psychological problems were causally related to his injury and the resulting impairment, and accepted Dr. Cranton's conclusion that Claimant "was not employable because of his mental disorder, characterized by a lack of significant energy and aggravated by his physical condition." (EX 1 at 6-7).

The evidence indicates, however, that Claimant's psychological problems subsided within a few years after his injury occurred. At trial, Claimant testified that his depressed state lasted approximately four and a half years. (TX 64). Afterwards, Claimant had no psychological treatment until 1993, when he was committed to the Transitional Living Center for five days following a confrontation with his son. (TX 60-73). Claimant testified at trial, however, that this conflict was unrelated to his 1977 injuries. (TX 75).

Moreover, the most recent psychiatric evaluation of Claimant indicates that Claimant's psychiatric condition has subsided. Dr. Henry A. Maggio, a Board Certified Psychiatrist, evaluated the Claimant on July 21, 1997, and concluded that "Mr. McNeill is not disabled from a psychiatric point of view, does not require treatment from a psychiatric point of view, and could return to work from a psychiatric point of view." (EX 6 at 5). Upon review of the evidence, I find that claimant is no longer prevented from working by his mental condition. Accordingly, I find that Claimant has undergone a change in mental condition.

As I find there has been a change in Claimant's physical and mental condition, I must now consider the extent of Claimant's current disability.

Extent of Disability

Total disability is defined as complete incapacity to earn pre-injury wages in the same work as at the time of injury or in any other employment. To establish a *prima facie* case of total disability, Claimant must show that he cannot return to his regular or usual employment due to his work-related injury. If Claimant meets this burden, Employer must establish the existence of realistically available job opportunities within the geographical area where Claimant resides which he is capable of performing, taking into consideration Claimant's age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. Mills v. Marine Repair Service, 21 BRBS 115, 117 (1988); American Stevedores, Inc. v. Salzano, 538 F.2d 933 (2d Cir. 1976), *aff'g*. 2 BRBS 178 (1975); McCabe v. Sun Shipbuilding & Dry Dock Co., 602 F.2d 59, n.7 and related text (3d Cir. 1979). If Employer satisfies its burden, then Claimant, at most, may be partially disabled. Container Stevedoring Co. v. Director, OWCP, 935 F.2d 1544, 24 BRBS 213 (9th Cir. 1991); Dove v. Southwest Marine of San Francisco, Inc., 18 BRBS 139 (1986). However, Claimant can rebut Employer's showing of suitable alternate employment, and retain eligibility for total disability benefits, if he shows he diligently pursued alternate employment opportunities but was unable to secure a position. Palombo v. Director, OWCP, 937 F.2d 70, 25 BRBS 1 (CRT) (2d Cir. 1991); Newport News Shipbuilding & Dry Dock Co. v. Tann, 841 F.2d 540, 21 BRBS 10 (CRT) (4th Cir. 1988); Roger's Terminal & Shipping Corp. v. Director, OWCP, 784 F.2d 687, 18 BRBS 79 (CRT) (5th Cir. 1986). In the current case, Employer does not contend that Claimant can return to his usual employment. Rather, Employer argues that suitable alternative employment is available to Claimant.

Employer has offered the report and testimony of Joseph Walker, a vocational rehabilitation counselor, to show the availability of suitable alternative employment. In Mr. Walker's report, he identified several jobs which, in his opinion, Claimant could perform. These jobs are:

1. Valet Attendant at Boomtown Casino, \$9.50 per hour
2. Security Guard at Boomtown Casino, \$6.50 per hour
3. Security Guard at Treasure Bay Casino, \$6.00 per hour
4. Sales Clerk at Krispy Kreme Doughnuts, \$5.50 per hour
5. Cashier at Fast Lane Service Station and Convenience Store, \$6.00 per hour
6. Security Guard at Wal-Mart, \$5.00 per hour
7. Dispatcher at All-American Towing, \$4.75 per hour
8. Dispatcher at Sun Cab Company, \$5.00 per hour.

In identifying jobs for Claimant, Mr. Walker relied on the reports of Doctors Longnecker and Bazzone. (EX 7 at 11). Based on these reports, Mr. Walker concluded that Claimant could perform unskilled to semi-skilled sedentary to light or light to medium work. (EX 7 at 11).

The Claimant has offered the report of Peggy Thiessen, who states that Claimant is unable to perform the jobs indicated by Mr. Walker. (CX 3 at 32). Ms. Thiessen stated that when she reviewed Mr. Walker's report, she found that the jobs identified all fell into the Light Strength Level category. (CX 3 at 32.) She stated that the Claimant was unable to perform these jobs, as his current abilities are in the Sedentary range. (CX 3 at 32). In his hearing testimony, Mr. Walker

responded to Ms. Thiessen's review of his report by noting that in his assessment of potential jobs, he tried to focus on the specific duties and demands of the job. (TX 106). He noted that he included jobs where a person could alternately sit, stand, or walk. (TX 106). Mr. Walker stated that Ms. Thiessen classified certain jobs as Light Strength which could also have been classified as Sedentary, depending on which occupational title was chosen. (TX 108). I find Mr. Walker's reasoning to be persuasive and well-reasoned. Accordingly, I will consider each job suggested by Mr. Walker to determine whether it meets the standards of suitable alternative employment.

In order to establish the availability of suitable alternative employment, Employer must establish the existence of realistically available job opportunities within the geographical area where Claimant resides which he is capable of performing, taking into consideration Claimant's age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. Mills v. Marine Repair Service, 21 BRBS 115, 117 (1988); American Stevedores, Inc. v. Salzano, 538 F.2d 933 (2d Cir. 1976), *aff'g*, 2 BRBS 178 (1975); McCabe v. Sun Shipbuilding & Dry Dock Co., 602 F.2d 59, n.7 and related text (3d Cir. 1979). The Employer is not required to act as an employment agency for the Claimant, however, it must prove the availability of actual, not theoretical, employment opportunities by identifying specific jobs available to the employee within the local community. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1042-43, 14 BRBS 156, 164-165 (5th Cir. 1981).

Initially, I note that the Claimant is 64 years old and has not worked in twenty years. I must consider this in determining which of the jobs indicated by Employer are suitable alternative employment. Mr. Walker addressed the likelihood of someone of Claimant's age being able to obtain employment, noting that due to changing trends in the workplace, there are even more opportunities for people of advanced age to perform work activity. (TX 96). He also stated that one possible drawback to hiring older workers, as reported by the Sun-Herald, was that they could be reluctant to use new technology. (TX 96-97).

Initially, I note that Mr. Walker's report indicated that he contacted Krispy Kreme Doughnuts twice. The Sales Clerk position was not currently available at the time of either contact, although Mr. Walker indicated in his report that the job was available on a periodic basis. However, Mr. Walker does not define "periodic basis" and accordingly, I do not find this to be sufficiently specific to establish that the job is realistically available. Accordingly, I will not consider this job in my analysis. Additionally, I note that the job identified by Mr. Walker as a dispatcher at All American Towing was not currently available when Mr. Walker contacted them. Mr. Walker indicated in his report that the job was available on a periodic basis, however, I do not find this to be sufficiently specific to establish that the job is realistically available. Accordingly, I will not consider this job in my analysis. Additionally, I note that the job identified by Mr. Walker as a dispatcher with Sun Cab Company was not a 40 hour per week job. Accordingly, I will not consider this job in my analysis.

After reviewing Mr. Walker's report, I find that his determination that Claimant was capable of performing the remaining jobs was well-reasoned and well-supported. This determination was

based on the surveillance videotape, the medical reports of Dr. Bazzone and Dr. Longnecker, and the psychiatric report of Dr. Maggio. Therefore, I find that Employer has established the availability of suitable alternate employment.

Claimant can rebut Employer's showing of suitable alternate employment, and retain eligibility for total disability benefits, if he shows he diligently pursued alternate employment opportunities but was unable to secure a position. Palombo v. Director, OWCP, 937 F.2d 70, 25 BRBS 1 (CRT) (2d Cir. 1991); Newport News Shipbuilding & Dry Dock Co. v. Tann, 841 F.2d 540, 21 BRBS 10 (CRT) (4th Cir. 1988); Roger's Terminal & Shipping Corp. v. Director, OWCP, 784 F.2d 687, 18 BRBS 79 (CRT) (5th Cir. 1986). The Claimant testified at the hearing, however, that he had not applied for any of the jobs identified by Mr. Walker in his report. (TX 80). Additionally, Claimant did not submit any other evidence to support a showing that he diligently pursued alternate employment. Accordingly, I find that Claimant has not rebutted Employer's showing.

In this case, the earliest date suitable alternate employment was shown was the date of Mr. Walker's report, August 7, 1997. Accordingly, I find that Claimant's permanent and total disability should cease as of August 6, 1997, and partial disability should commence as of August 7, 1997.

Permanent Partial Disability

Section 8(c) of the LHWCA provides the scheduled compensation for disability that shall be paid to the employee. Claimant's back injuries do not come within one of the scheduled types of disability and are covered by §8(c)(21) which provides that ". . . In all other cases in the class of disability, the compensation shall be 66 2/3 per centum of the difference between the average weekly wages of the employee and the employee's wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability."

In determining the extent of the disability, I must determine a dollar figure reflective of claimant's post injury wage earning capacity and compare it to Claimant's average weekly wage at the time of injury. LaFaille v. Benefits Review Board, 994 F.2d 54, 61 (2d Cir. 1989); Cook v. Seattle Stevedore, Co., 21 BRBS 4, 7, 1(1988). The burden of proving a post injury wage earning capacity shifts to the employer, once claimant establishes that he is unable to return to his regular duties, as in the instant claim. New Orleans (Gulfwide) Stevedores, Inc. v. Turner, 666 F.2d 1031 (5th Cir. 1981).

In computing Claimant's post injury wage earning capacity, I should average the pay scale of the suitable alternative jobs established thorough job surveys. Shell Offshore, Inc. v. Director, OWCP, 112 F.3d 312, 318 (5th Cir. 1997). In averaging the wages, I find that the average pay scale of the suitable alternative jobs is \$6.60 per hour. I must now adjust the pay scale of these jobs to determine what they would have paid at the time of Claimant's injury in 1977. As Employer argued, Mr. Walker testified at trial that the minimum wage job he found in June of 1997 would have paid \$2.70 per hour in 1977. (TX 116). This indicates a discount factor of .568, which, when

applied to the average pay scale of the suitable alternative jobs, indicates that the jobs in Mr. Walker's survey would have paid an average of \$3.75 per hour for a 40 hour week or \$150.00 per week in 1977. When subtracted from Claimant's average weekly wage of \$231.08, I find a weekly wage loss of \$81.08.

Section 7 Medical Benefits

Claimant is entitled to medical benefits under Section 7 of the Act for reasonable, necessary and appropriate expenses related to his injury. To receive medical benefits, Claimant must establish that the medical expenses are related to the compensable injury. Pardee v. Army & Air Force Exch. Serv., 13 BRBS 1130 (1981); Suppa v. Lehigh Valley R.R. Co., 13 BRBS 374 (1981). In the present case, Claimant has submitted receipts for prescription drugs, requesting reimbursement for these expenses. (CX 2). However, Claimant has submitted no physician testimony or other evidence establishing that these prescriptions were related to Claimant's injury. Therefore, Claimant is not entitled to reimbursement for these expenses.

Additionally, Claimant alleges that he is entitled to reimbursement for unpaid medical bills. At the hearing, Claimant testified that he has not seen a doctor for his injuries since 1986. (TX 47). Claimant stated that he terminated medical treatment due to the Employer's failure to provide the requested authorization. Once the employer has refused to provide treatment or to satisfy a claimant's request for treatment, the claimant is released from the obligation of continuing to seek employer's approval. Pirozzi v. Todd Shipyards, Corp., 21 BRBS 984 (1988). The claimant then need only establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury, in order to be entitled to such treatment at the employer's expense. Rieche, 16 BRBS at 275; Beynum, 14 BRBS at 958. The Claimant has submitted several bills for medical treatments for which he requests reimbursement. The first is a bill for \$118.00 from Gulf Coast Community Hospital dated February 12, 1986 for diagnostic radiology. The second is a personal check from Mr. McNeill payable to Dr. Cranton in the amount of \$55.00 dated February 6, 1985. The third is a personal check from Mr. McNeill payable to Gulf Coast Orthopaedic Clinic in the amount of \$117.00 dated October 10, 1985. The third is a bill from Dr. Longnecker in the amount of \$147.00 dated September 20, 1978. The remainder of the bills submitted were for psychotherapy sessions with Dr. Tate in 1993 and for his hospitalization in 1993. Claimant testified at trial that these sessions were the result of a conflict with his son which was unrelated to his injuries. Upon review of the bills submitted by Claimant, I find that all of the bills except the bills from Claimant's 1993 psychotherapy and hospitalization were related to his injury. Accordingly, Claimant is entitled to reimbursement for the related medical expenses in the sum of \$437.00.

Attorney Fees and Costs

Section 28 of the Longshore Act provides for the recoupment of a claimant's attorney fees and costs in the event of a "successful prosecution." 33 U.S.C. § 928. In the present case, Claimant has been awarded benefits for permanent, partial disability. Additionally, Claimant has established that he is entitled to reimbursement for certain medical expenses related to his injury.

Therefore, as Claimant has had a limited recovery, Claimant's counsel is entitled to fees for his work before the Office of Administrative Law Judges. Counsel for Claimant shall have thirty (30) days from the date of this order within which to file an application for attorney fees and costs incurred.

ORDER

Based upon the foregoing findings of fact, conclusions of law and the entire record, I issue the following Order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

IT IS HEREBY ORDERED THAT:

1. Claimant is entitled to compensation based upon his average weekly wage for permanent total disability from August 29, 1978, until August 6, 1997, excluding any periods for which he has already been paid. The parties stipulated that the average weekly wage is \$231.08.
2. Claimant is entitled to permanent partial disability compensation based upon an average weekly wage of \$231.08 per week minus the \$150.00 I find he is capable of earning. Therefore, Employer is responsible for a permanent partial disability based on an average weekly wage loss of \$81.08 commencing August 7, 1997.
3. Claimant is entitled to payment of reasonable and necessary medical expenses in the sum of \$437.00 pursuant to §7.
4. Claimant is entitled to payment of attorney's fees for his limited recovery. Counsel for Claimant shall have thirty (30) days from the date of this order within which to file an application for attorney fees and costs incurred
5. Employer shall furnish such reasonable, appropriate and necessary medical care and treatment as Claimant's work-related injury referenced herein may require and will reimburse Claimant for any unpaid medical bills that are determined to be reasonable, appropriate and necessary for his work-related injury.

PAUL H. TEITLER
Administrative Law Judge

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